BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51

COMMENTS OF COMPTEL

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TABLE OF CONTENTS

		<u>Page</u>
Sumn	nary	iii
I.	Goals of Contribution Reform	3
II.	Who Should Contribute To Universal Service	. 5
	A. Determining Contribution Obligations On A Case-by-Case Basis	7
	 Enterprise Communications Services Text Messaging Services One-Way VoIP Service Providers Broadband Internet Access Service Providers Listing of Services Subject To Universal Service Contribution 	. 11 13 14
	B. Determining Contribution Obligations Through A Broader Definitional Approach	18
III.	How Contributions Should Be Assessed	21
	A. Reforming The Revenue-Based System	22
	 Apportioning Revenues From Bundled Services Contributions For Services With An Interstate Telecommunications Component Allocating Revenues Between Inter- and Intrastate Jurisdictions Contribution Obligations of Wholesalers and Their Customers a. The Commission Should Not Adopt A Value Added	22 24 25 28 29 30 31
	6. Reforming The <i>De Minimis</i> Exemption	31
	B. Assessing Contributions Based on Connections	32
	C. Assessing Contributions Based on Numbers	34
IV.	Improving The Administration of the Contribution System	35
	A. Revising the Frequency of Adjustments To the Contribution Factor	35
	B. Pay-and-Dispute Policy	36

		<u>Page</u>
V.	Recovery of Universal Service Contributions From End Users	37
	A. Pass-Through of USF Contributions as a Separate Line Item	37
	B. Segregation of USF Pass-Through Charges	40
	C. Limiting Pass-Through of USF Charges to Lifeline Subscribers	41
Conc	elusion	43

SUMMARY

The Commission's universal service contribution system desperately needs reform and that reform needs to be implemented sooner rather than later. As with any amendments to the Commission's rules, the universal service contribution reforms must be applied prospectively only and providers must be given a sufficiently long transition period – no less than six months -- to implement the necessary changes to their back office systems and become familiar with any new reporting procedures.

At a minimum, the Commission must expand the pool of services and providers that are subject to contribution so as to incorporate the new technologies and service offerings that individuals and businesses use to communicate in today's world. Services that should be added to the contribution base include enterprise communications services, text messaging services, one-way VoIP services and broadband Internet access services. In addition, the Commission must adopt straight forward, competitively neutral bright line rules that clearly define the contribution obligations of telecommunications providers so that all providers are on notice of which services are assessed and how those assessments are performed. The Commission should retain in its rules a non-exhaustive list of services that are subject to assessment and the list should be updated periodically, and no less than annually, to keep paces with changes in technology. Such a list would provide necessary and unambiguous guidance on the assessability of the services included.

For the present time, the Commission should continue to assess contributions on a revenue-basis. The lack of clarity in the Commission's connections-based proposal makes the request for comments more appropriate to a Notice of Inquiry than a Notice of Proposed Rulemaking. Without specific information as to how connections would be defined and how

contributions would be assessed, no reliable analysis can be done on the impact of a connections-based contribution system on contributors, end users or the size and sustainability of the fund. The Commission would have to issue a further notice before seriously considering adopting a connections-based methodology. Contribution reform should not be delayed in the meantime. While a numbers-based contribution system might be easy to implement from an administrative standpoint, it would exempt from contribution all services that do not use North American Numbering Plan telephone numbers and may by default perpetuate the inequitable system that exists today with voice customers financing nationwide universal service support of landline and mobile broadband networks and Internet access services.

The most important administrative improvement the Commission can make is to timely respond to the Universal Service Administrative Company's ("USAC") Requests for Guidance and to comply with Commission Rule Section 54.724's 90 day deadline for resolving appeals of USAC rulings. The Commission's failure to address open issues that have been presented for review for years at a time unnecessarily prolongs confusion and inequitable situations where some providers are contributing on certain services and therefore operating at a competitive disadvantage to those providers who are not contributing. The Commission should not adopt USAC's pay-and-dispute practice as a policy or rule without a firm commitment to honor the 90 day deadline for resolving appeals. Under USAC's practice, contributors are forced to pay now and dispute later or face interest, penalties and late payment fees. As a result, timely resolution of appeals is critical especially because USAC does not pay contributors interest on the disputed amounts even when they prevail on appeal.

provide more transparency, the Commission seeks comment on whether it should require contributors to disclose to potential customers what portion of their bills are subject to universal service charges, what the assessment factor is or how many units are subject to assessment, and whether universal service pass through charges should be included in the advertised price of a service rather than as a separate line item. Telecommunications customers have a right to know what they are paying for universal service and a separate federal universal service line item on their monthly bills serves that purpose. If the Commission truly wants to promote transparency, it should not restrict the right of providers to inform their customers in the simplest and plainest way possible what they are paying each month to preserve and advance universal service.

Finally, the Commission should not adopt a rule specifying that telecommunications providers that recover their contributions from end users are acting on behalf of the universal service fund, requiring them to segregate those payments in dedicated accounts and requiring them to give USAC access to and/or signatory authority over the dedicated accounts. The purpose of the Commission's proposal appears to be an attempt to give USAC priority over other creditors in the event a provider files for bankruptcy. Even if the Commission were to adopt such a rule, which it should not, there is no guarantee that a bankruptcy court would not void any payments made to USAC within 90 days of the filing of a bankruptcy petition as avoidable preferences. Moreover, the Commission cites no authority that would give it jurisdiction to require telecommunications providers not only to establish separate accounts for USAC contributions, but also to give USAC access to and signatory authority over the accounts. Neither outside accountants nor boards of directors are likely to deem a grant of third party access to and signatory authority over an operating account fiscally responsible or in the best interests of the company.

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COMPTEL, through undersigned counsel, hereby submits these comments in response to the Commission's Further Notice of Proposed Rulemaking on Universal Service contribution reform.¹ Contribution reform is long overdue and it is imperative that the Commission take advantage of the momentum it has built up from the recent overhauls of the High Cost² and Lifeline³ distribution systems to institute changes that will expand the contribution base and reduce the burden of double digit assessment factors that telecommunications service providers and consumers of voice telecommunications services have been forced to bear almost every

In the Matter of Universal Service Contribution Reform, WC Docket No. 06-122, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. Apr. 30, 2012) ("FNPRM").

In the Mattter of Connect America Fund, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov.18, 2011) ("Connect America Fund Order").

In the Matter of Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012).

quarter for the last six years.⁴ Contribution reform should be given top priority on the Commission's agenda.⁵

See FCC Public Notice, Proposed First Quarter 2006 Universal Service Contribution Factor, CC Docket No. 96-45, DA 05-3203 (rel. Dec. 15, 2005) (10.2%); FCC Public Notice, Proposed Second Quarter 2006 Universal Service Contribution Factor, CC Docket No. 96-45, DA 06-571 (rel. Mar. 13, 2006) (10.9%); FCC Public Notice, Proposed Third Quarter 2006 Universal Service Contribution Factor, CC Docket No. 96-45, DA 06-1252 (rel. June 9, 2006) (10.5%); FCC Public Notice, Proposed Second Quarter 2007 Universal Service Contribution Factor, CC Docket No. 96-45, DA 07-1330 (rel. Mar. 16, 2007) (11.7%); FCC Public Notice, Proposed Third Ouarter 2007 Universal Service Contribution Factor, CC Docket No. 96-45, DA 07-3203 (rel. June 14, 2007) (11.3%); FCC Public Notice, Proposed Fourth Quarter 2007 Universal Service Contribution Factor, CC Docket No. 96-45, DA 07-3928 (rel. Sep. 13, 2007) (11.02%); FCC Public Notice, Proposed First Quarter 2008 Universal Service Contribution Factor, CC Docket No. 96-45, DA 07-5007(rel. Dec. 4, 2007) (10.2%); FCC Public Notice, Proposed Second Quarter 2008 Universal Service Contribution Factor, CC Docket No. 96-45, DA 08-576 (rel. Mar. 14, 2008) (11.3%); FCC Public Notice, Proposed Third Quarter 2008 Universal Service Contribution Factor, CC Docket No. 96-45, DA 08-1393 (rel. June 11, 2008) (11.4%); FCC Public Notice, Proposed Fourth Quarter 2008 Universal Service Contribution Factor, CC Docket No. 96-45, DA 08-2091 (rel. Sep. 12, 2008) (11.4%); FCC Public Notice, Proposed Second Quarter 2009 Universal Service Contribution Factor, CC Docket No. 96-45, DA 09-884 (rel. Mar. 13, 2009) (11.3%); FCC Public Notice, Proposed Third Quarter 2009 Universal Service Contribution Factor, CC Docket No. 96-45, DA 09-1322 (rel. June 15, 2009) (12.9%); FCC Public Notice, Proposed Fourth Quarter 2009 Universal Service Contribution Factor, CC Docket No. 96-45, DA 09-2042 (rel. Sep. 14, 2009) (12.3%); FCC Public Notice, Proposed First Quarter 2010 Universal Service Contribution Factor, CC Docket No. 96-45, DA 09-2588 (rel. Dec. 11, 2009) (14.1%); FCC Public Notice, Proposed Second Quarter 2010 Universal Service Contribution Factor, CC Docket No. 96-45, DA 10-427 (rel. Mar. 12, 2010) (15.3%); FCC Public Notice, Proposed Third Quarter 2010 Universal Service Contribution Factor, CC Docket No. 96-45, DA 10-1055 (rel. June 10, 2010) (13.6%); FCC Public Notice, Proposed Fourth Quarter 2010 Universal Service Contribution Factor, CC Docket No. 96-45, DA 10-1716 (rel. Sep. 10, 2010) (12.9%); FCC Public Notice, Proposed First Quarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, DA 10-2344 (rel. Dec. 13, 2010) (15.5%); FCC Public Notice, Proposed Second Quarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, DA 11-473 (rel. Mar. 10, 2011) (14.9%); FCC Public Notice, Proposed Third Ouarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, DA 11-1051 (rel. June 14, 2011) (14.4%); FCC Public Notice, Proposed Fourth Quarter 2011 Universal Service Contribution Factor, CC Docket No. 96-45, DA 11-1543 (rel. Sep. 13, 2011) (15.3%); FCC Public Notice, Proposed First Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, DA 11-2020 (rel. Dec. 14, 2011) (17.9%); FCC Public Notice, Proposed Second Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, DA 12-396 (rel. Mar. 13, 2005) (17.4%).

The overhaul of the contribution system that the Commission contemplates in this proceeding will require contributors not only to make adjustments to their back office systems to effectuate the changes, but also to revise the way revenues (or connections or telephone numbers) are reported to the Universal Service Administrative Company ("USAC") on the quarterly and annual telecommunications work sheets. The Commission must allow providers an adequate transition period to make these adjustments and that transition period should be no less than six months.

I. GOALS OF CONTRIBUTION REFORM

COMPTEL enthusiastically supports the Commission's goal of making compliance with and administration of the universal service contribution system more efficient by developing "rules that operate clearly within the evolving structure of the marketplace;" closing loopholes; ensuring fairness and competitive neutrality; implementing improvements that will adapt to market changes and stabilize the contribution base; and ensuring the delivery of affordable communications to all Americans. The Commission must acknowledge, however, that these are more than just goals that it should strive to achieve in its administration and management of the universal service fund. They are critical components of the Commission's statutory obligation to ensure that providers of telecommunications make equitable and nondiscriminatory contributions to the preservation and advancement of universal service.

As the Commission has appropriately recognized, changes in the marketplace, including the widespread offering of bundled service packages, all distance calling plans and new

It has been more than two years since the National Broadband Plan recommended contribution reform. National Broadband Plan Recommendation 8.10.

⁶ FNPRM at ¶¶23-26.

⁷ 47 U.S.C. §§254(b)(4) and (d).

communications products with information service components, have led to discrepancies in the way providers calculate their contribution obligations and have created situations where some providers contribute on specific services while others do not. The lack of clarity in the existing rules as well as the failure of the existing rules to keep pace with changes in the marketplace mandate that the Commission reexamine and reform the rules defining the contribution base and assessable services. Doing so with a focus on closing loopholes and ensuring fairness and competitive neutrality in the contribution system is a necessary prerequisite to fulfillment of the statutory directive that all providers make equitable and nondiscriminatory contributions to the preservation and advancement of universal service. The Government Accountability Office ("GAO") has long urged the Commission to develop performance goals to improve the management and distribution of universal service funds. Performance goals are equally necessary for the Commission's management and oversight of the contribution collection process.

⁸

FNPRM at ¶23.

See e.g., Improved Management Can Enhance FCC Decision Making for the Universal Service Fund Low-Income Program, GAO Report No. 11-11 (Oct. 2010); FCC's Performance Management Weaknesses Could Jeopardize Proposed Reforms of the Rural Health Care Program, GAO Report No. 11-27 (Nov. 2010); FCC Should Assess the Design of E-Rate Program's Internal Control Structure, GAO Report No. 10-908 (Sep 2010); Long-Term Strategic Vision Would Help Ensure Targeting of E-Rate Funds To High Priority Uses, GAO Report No. 09-253 (Mar. 2009); Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program, GAO Report No. 05-15 (Feb. 2005); Schools and Libraries Program: Application and Invoice Review Procedures Need Strengthening, GAO Report No. 01-105 (Dec. 2000); Schools and Libraries Program: Actions Taken To improve Operational Procedures Prior to Committing Funds, Report No. GAO/RCED-99-51 (Mar. 1999); FCC Needs To Improve Performance Management and Strengthen Oversight of the High Cost Program, GAO Report No. 08-633 (June 2008).

II. WHO SHOULD CONTRIBUTE TO UNIVERSAL SERVICE

Section 254(d) of the Act states that all telecommunications carriers that provide interstate telecommunications services shall contribute to the universal service fund. In addition, Section 254(d) states that the Commission may require any other provider of interstate telecommunications to contribute to the fund if the public interest so requires. The Commission asks for comment on how it should interpret the term "provider of interstate telecommunications."

As the Commission noted, the D.C. Circuit has upheld the Commission's interpretation of the phrase "provider of telecommunications" as including providers that supply telecommunications as a component of finished products offered to end users. This interpretation is consistent with other provisions of the Act and is broad enough to include information services and information service providers. Section 153(20) of the Act defines information service as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information *via telecommunications*" (emphasis added). Given the Commission's continuing reluctance to classify certain services as either telecommunications services or information services, maintaining such an inclusive interpretation of the term "provider of telecommunications" is essential for purposes of ensuring that the Commission has the maximum discretion to expand the base of providers and services required to contribute to the universal service fund.

The Commission asks for comment on what factors it should consider in deciding whether the public interest warrants exercising its permissive authority to require providers of

¹⁰ NPRM at ¶¶32-33.

NPRM at ¶33; Vonage Holdings Corporation v. FCC, 489 F. 3d 1232, 1240 (D.C. Cir. 2007).

telecommunications to contribute to the universal service fund. COMPTEL submits that at the very least, the public interest requires that any telecommunications provider that benefits from access to the public switched telephone network in delivering or receiving services should be subject to contribution. Over 15 years ago, the Commission adopted the principle of competitive neutrality as necessary and appropriate for the preservation and advancement of universal service. Indeed, the Commission determined that the principle of competitive neutrality should be considered in formulating universal service policies relating to each and every recipient of and contributor to universal service support mechanisms. In this context, "competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage or disadvantage one provider over another and neither unfairly favor nor disfavor one technology over another."

Consistent with this principle, the Commission should exercise its discretionary authority to compel all providers that incorporate telecommunications into their finished products to contribute to the universal service fund, whether their finished products are provided via circuit-switched, packet-switched or some other transmission technology, and whether or not the Commission has classified their finished products as telecommunications services or information services. Exercising its discretionary authority to so expand the contribution base will ensure that integrated services that combine both telecommunications and non-telecommunications components and that compete with, or are used by consumers and businesses in lieu of,

¹² NPRM at ¶35.

Section 254(b)(7) of the Act authorizes the Commission to adopt principles for the preservation and advancement of universal service in addition to those enumerated in Sections 254(b)(1) through (b)(6).

In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 at ¶¶47-49 (1997).

assessable telecommunications services bear a fair share of the cost of preserving and advancing universal service. In order to distribute the burden of supporting universal service more equitably, the Commission must expand the pool of services and providers that are subject to contribution to incorporate new technologies and service offerings that more accurately reflect the way that individuals and businesses communicate in today's world. As new providers enter the market or introduce new services, they will be on notice that they will be obligated to contribute to the universal service fund if the finished products they make available to end users incorporate telecommunications components.

A. Determining Contribution Obligations on a Case-by-Case Basis

The Commission asks for comment on whether it should clarify or modify its contribution requirements for specific services, including enterprise communications services that include a provision of telecommunications; text messaging services; one way VoIP services; and broadband Internet access services. There is no question that the Commission needs to clarify that text messaging services and enterprise communications services that include a telecommunications component, such as Dedicated IP, Virtual Private Networks ("VPNs"), Wide Area Networks ("WANs") and other network services that are implemented with various protocols such as ATM/Frame Relay, Multiprotocol Label Switching ("MPLS") and Provider Backbone Bridging ("PBB") are assessable as telecommunications services. The Commission also needs to modify its rules to require providers of one-way VoIP and broadband Internet access services to contribute to universal service.

¹⁵ NPRM at ¶38.

1. Enterprise Communications Services

Almost three years ago, USAC asked the Commission for guidance on the proper categorization and assessability of VPN and Dedicated Internet Protocol services that use ATM/Frame Relay and MPLS.¹⁶ Over the last three years, a number of private parties have also asked the Commission for clarification of the contribution obligations on revenues from such services and have sought review of USAC decisions relating to these matters.¹⁷ The Commission has not acted on any of these petitions or appeals. As a result of the continued uncertainty, there is a lack of consistency in whether and/or how providers are contributing to the universal service fund on these services. Those providers who do not contribute clearly have a competitive advantage over those providers who do contribute and pass the universal service charge through to their end users.

To the extent that the Commission is reluctant to classify any integrated enterprise network service that incorporates a telecommunications component as a telecommunications service or an information service, the Commission can and should exercise its permissive authority to require the providers of such services to contribute to the universal service fund based on the revenues obtained from the transmission components of the services. In the alternative, if the Commission were to conclude that Dedicated IP, VPNs, WANs or other

See August 19, 2009 Letter from Richard A. Belden, Chief Operating Officer, USAC, to Julie Veach, Acting Chief , Wireline Competition Bureau, Policy Guidance Regarding Universal Service Fund Matters Previously Submitted to Commission Staff, WC Docket No. 06-122.

See e.g., Petition for Clarification, or in the Alternative, Application for Review filed by Massergy Communications, Inc. in WC Docket No. 06-122 on March 27, 2009; Request for Review of Decision of the Universal Service Administrator filed by XO Communication Services, Inc. in WC Docket No. 06-122 on December 29, 2010; Request for Review of Decision of the Universal Service Administrator filed by Equant, Inc. in WC Docket No. 06-122 on January 3, 2012.

enterprise communications services are telecommunications services, under no circumstances should it exercise its forbearance authority under Section 10 of the Act¹⁸ to exempt these services from contribution.¹⁹ The Commission may not grant forbearance unless it finds that three conditions have been met, including a finding that forbearing from enforcing a statutory provision or rule will serve the public interest.²⁰ In making the public interest determination, the Commission must consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.²¹ At the very least, the Commission could not possibly determine that exempting such services from bearing a fair share of the cost of preserving and advancing universal service at the expense of more traditional residential and business voice services would promote competitive market conditions or enhance competition among providers.

The Commission asks for comment on how exercising its permissive authority to bring such service providers into the contribution base would affect the size of the contribution base, bring additional contributors into the system that do not contribute today directly or indirectly, affect the distribution of contribution obligations among various industry segments, affect the relative distribution of contribution obligations between services provided to enterprise customers and residential customers and affect the average contribution of different residential end users, such as low volume versus high volume users or low income consumers.²² The

¹⁸ 47 U.S.C. §160.

¹⁹ See NPRM ¶46.

²⁰ 47 U.S.C. §160(a)(3).

²¹ *Id*.

²² FNPRM at ¶45.

Commission has not yet ruled that providers of such enterprise communications services are required to contribute. As a result, bringing these services into the contribution base would clearly increase the size of the base and bring additional contributors into the base. Because telecommunications providers are permitted to request confidential treatment and nondisclosure of the revenue information reported to USAC on Forms 499-A and 499-Q, ²³ however, the only entities that would have access to the complete revenue data necessary to make any revenue estimates are the Commission and USAC. If the Commission believes that such information is a necessary prerequisite to clarifying the contribution obligation of enterprise communications services that incorporate a telecommunications component, the Commission and USAC should enter into the record estimates of the financial impact of including such services in the contribution base.

The Commission asks whether it should eliminate the systems integrators' exemption if it exercises its permissive authority to assess enterprise communications services. ²⁴ Under the current rules, systems integrators are not required to contribute to the universal service fund if revenues from the resale of telecommunications represent less than five percent of total revenues from the systems integration services. ²⁵ Systems integrators who qualify for the exemption, however, are required to disclose that fact to their underlying providers so that the providers know to contribute on the revenues they receive from the sale of the telecommunications to the system integrators. ²⁶ For purposes of this proceeding, the critical determination that the

See Telecommunications Reporting Worksheet, FCC Form 499-Q at Line 121 and Telecommunications Reporting Worksheet FCC Form 499-A at Line 605.

²⁴ FNPRM at ¶47.

See e.g., In the Matter of the Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Fourth Order on Reconsideration, 13 FCC Rcd 5318 at ¶281 (1997).

Commission must make is that the telecommunications components resold to end users by systems integrators are assessable. Whether the contributions are made directly by the systems integrators or indirectly by their underlying service providers will have far less of an impact on the amounts available to fund universal service than will the Commission's clarification that enterprise communications services that incorporate telecommunications are subject to contribution. If the exemption is eliminated, amounts available to fund universal service would be increased by the assessment on the retail markup the systems integrators charge for the telecommunications component of their services.

2. Text Messaging Services

Almost five years ago, Public Knowledge and several other public interest groups filed a Petition for Declaratory Ruling asking the Commission to clarify whether text messaging is a telecommunications or an information service. Over a year ago, USAC filed a request with the Commission asking for guidance on how carriers should report text messaging revenues for contribution purposes, noting that some carriers were reporting text messaging revenues as non-assessable information services revenues, while other carriers were reporting text messaging revenues as assessable telecommunications revenues. The Commission has yet to provide clarification or guidance. In light of the pending Public Knowledge Petition for Declaratory Ruling and the USAC Request for Guidance, it is unclear why the Commission is asking to what extent there is a lack of clarity in the industry over whether text messaging services are subject to

See Petition for Declaratory Ruling of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, Educause, Media Access Project, New America Foundation, U.S. PIRG filed in WT Docket No. 08-7 on December 11, 2007.

See April 22, 2011 Letter from Richard A. Belden, Chief Operating Officer, USAC, to Sharon Gillett, Chief Wireline Competition Bureau, Request for Guidance, WC Docket No. 06-122.

universal service contribution.²⁹ There is no question that the lack of clarity in the Commission's rules and the instructions to the Form 499 continue to create confusion and competitive distortions in the contribution process with some providers contributing more than they should and/or other providers contributing less than they should.³⁰

The Commission does not propose to classify text messaging as a telecommunications service or an information service in this proceeding.³¹ Nor does the Commission need to do so in order to exercise its permissive authority to impose universal service contribution obligations on providers of text messaging services. Explicitly concluding that providers of text messaging services must contribute to the universal service fund would promote the Commission's goals of fairness and competitive neutrality for several reasons. First, such a clarification would eliminate the competitive disadvantage that currently exists as a result of some providers contributing on their text messaging revenues and other providers not contributing. Secondly, there is substantial evidence that consumers are substituting text messaging for traditional voice services. Indeed, the Commission itself has reported that as of May 2010, 72 percent of mobile phone users were using text messaging and that as of 2009, a higher percentage of teenagers were using text messaging (54 percent) than were using mobile voice services (38 percent).³²

²⁹ FNPRM at ¶50.

USAC April 22, 2011 Request for Guidance at 4.

FNPRM at n. 151. In light of this determination, it is unclear why the Commission is asking whether it should exercise its permissive authority to assess text messaging service without determining whether text messaging is a telecommunications service or an information service.

In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133, Fifteenth Report, FCC 11-103 at Chart 9 and ¶171 (rel. June 27, 2012) ("Fifteenth Annual Competition Report").

Thirdly, the sheer volume of text messages being exchanged among mobile phone users is enormous – 193.1 billion messages per month ³³ -- and underscores the attractiveness of the service to consumers as a means of communication. Finally, text messaging revenues are more than \$20 billion annually.³⁴ Under these circumstances, continuing to assess universal service fees on voice revenues and not text messaging revenues would be neither fair nor competitively neutral. Both short messaging service ("SMS") (text) and multimedia messaging service ("MMS") (photographs, video and other multimedia messages) revenues should be assessable.

3. One-Way VoIP Service Providers

COMPTEL supports the Commission's proposed definition of one-way VoIP service as a service that provides users with the capability to originate calls to *or* terminate calls from the PSTN and otherwise meets the definition of interconnected VoIP service.³⁵ The Commission exercised its permissive authority six years ago to require interconnected VoIP service providers to contribute to the universal service fund based on their provision of interstate telecommunications and the fact that consumers increasingly viewed interconnected VoIP service as a substitute for traditional telephone service.³⁶ The same rationale should trigger the exercise of the Commission's permissive authority to require one-way VoIP providers to contribute to the universal service fund. As is the case with interconnected VoIP providers, one-

See Wireless Quick Facts, available at http://www.ctia.org/consumer_info/service/index.cfm/AID/10323.

Jenna Wortham, *Free Texts Pose Threat To Carriers*, New York Times (Oct. 9, 2011), available at http://www.nytimes.com/2011/10/10/technology/paying-to-text-is-becoming-passe-companies-fret.html?pagewanted=all.

³⁵ FNPRM at ¶58.

In the Matter of Universal Service Contribution Methodology, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7518 at ¶¶3, 41 (2006).

way VoIP providers provide interstate telecommunications and compete with traditional telephone service providers.³⁷ The Commission asks for comment "on the extent of competition between one-way VoIP and other services that are subject to assessment and how that should affect our analysis."³⁸ COMPTEL submits that the "extent of competition" provided by one-way VoIP services to traditional telephone services and interconnected VoIP services should be irrelevant to the Commission's analysis. What is relevant is that one-way VoIP providers provide interstate telecommunications and that the public interest will be served by one-way VoIP services being assessable to the same extent that other voice services are assessable.

4. Broadband Internet Access Service Providers

The Commission asks for comment on whether it should impose universal service contribution obligations on broadband Internet access services.³⁹ COMPTEL submits that it should, particularly now that universal service dollars are being used to fund broadband Internet access.

The Commission first categorized broadband Internet access service as an information service with a telecommunications component ten years ago.⁴⁰ At that time, the Commission

See e.g., Skype S.a.r.l. Prospectus, Amendment No. 2 to Form S-1 Registration Statement at 14, 30-31 (Mar. 4, 2011) (SkypeOut product enables users to make low-priced calls to landline and mobile devices; "we compete with certain products and services offered by regulated telecommunications companies that provide landline, cable or wireless communications products and hardware-based VoIP telecommunications providers"; "we compete increasingly with small and medium sized enterprise telecommunications service providers").

³⁸ FNPRM at ¶ 61.

³⁹ *Id.* at 67.

In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, 17 FCC Rcd 4798 (2002).

stated that it would determine whether broadband Internet access service providers should be required to contribute to universal service in the *Wireline Broadband* proceeding. When it subsequently issued an order in the *Wireline Broadband* proceeding three years later, it directed wireline broadband Internet access providers to maintain their current universal service contribution levels for 270 days to "preserve existing levels of universal service funding and prevent a precipitous drop in funding levels while we consider reform." The Commission also promised that if it was unable to complete new contribution rules within the 270 day period, it would take whatever action was necessary to preserve existing funding levels. An additional seven years have passed, and the Commission has yet to replace the temporary 270 day rule or otherwise address the contribution obligations of broadband Internet access service providers. The time for the Commission to act is long overdue.

The Commission has recently conditioned the receipt of high-cost universal service funds on eligible telecommunications carriers ("ETCs") offering broadband service meeting certain basic performance requirements. ⁴³ In addition, the Commission has recently amended its Lifeline rules to permit ETCs to allow low income consumers to apply Lifeline discounts to all residential service plans that include voice, including bundled packages that include voice and broadband, and to fund a low income broadband pilot program. ⁴⁴ Now that broadband Internet

⁴¹ *Id.* at ¶110.

In the Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, 20 FCC Rcd 14853 ¶112-113 (2005).

In the Matter of Connect America Fund, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, at ¶86-114 (rel. Nov. 18, 2011).

In the Matter of Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 at ¶¶6, 315, 322 (rel. Feb. 6, 2012) ("Lifeline Reform Order"); 47 C.F.R. §54.401(a). The Commission has

access services will be explicitly supported by universal service funds, providers of those services must be compelled to bear a share of the cost of providing universal access to the nationwide network.⁴⁵ Fairness and equity demand no less, especially as the telecommunications network transitions from narrowband to broadband.

The Commission asks whether residential broadband Internet access services should be excluded from the contribution base on the grounds that assessing such services may discourage consumers from subscribing to broadband. Significantly, the Commission does not ask whether continuing to assess voice customers at ever increasing double digit rates in order to subsidize broadband service could discourage consumers from subscribing to voice services. While including broadband services in the contribution base may raise the retail rates of those services somewhat, there is no doubt that subscribers are receiving the benefit of access to a nationwide network supported by universal service funds. Excluding broadband Internet access services from the contribution base will simply maintain the status quo and is unlikely to lead to any significant reduction in the assessment factor.

In order to ensure competitive neutrality, the Commission must assess all forms of broadband Internet access, including wired, satellite, fixed and mobile wireless, residential and enterprise.⁴⁷ Assessing some forms of broadband but not others would be inconsistent with the equitable and nondiscriminatory contribution requirement of Section 254(d) as well as the

also adopted as an express goal of the Lifeline program ensuring the availability of broadband service for low income Americans. *Lifeline Reform Order* at ¶33.

See Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 428 (5th Cir. 1999) ("Congress designed the universal service scheme to exact payment from those companies benefiting from the provision of universal service.").

⁴⁶ FNPRM at ¶¶67-68, 84-85.

⁴⁷ FNPRM at ¶¶70, 84-85.

Commission's long standing determination that the universal service rules should be competitively neutral and should neither "unfairly advantage nor disadvantage one provider over another and neither unfairly favor nor disfavor one technology over another."

5. Listing of Services Subject To Universal Service Contribution

COMPTEL submits that the Commission should continue to specify in its regulations a non-exhaustive list of services included in the contribution base and should definitely update the list to reflect marketplace changes over the last decade as well as marketplace changes yet to occur. Maintaining a list of services subject to contribution provides clarity and certainty with respect to contribution obligations and simplifies compliance and administration. It is critical, however, that the Commission update the list periodically as new services come on the market in an effort to minimize confusion, resolve ambiguities and ensure that all providers are contributing equitably. Such updates should be done no less than once a year using procedures similar to those that the Commission uses for updating the eligible services list for the Schools and Libraries Program.⁴⁹ It is also critical that the Commission timely respond to USAC's Requests for Guidance and the industry's requests for declaratory rulings and appeals of USAC decisions rather than defer action on them for years at a time.⁵⁰ Providing timely advice in response to questions on the contribution obligations of particular services would substantially curb the unfairness caused in situations where some providers contribute on certain services but

Federal State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 at ¶47 (1997).

⁴⁹ See 47 C.F.R. § 54.502.

Pursuant to Section 54.724 of the Commission's Rules, the Commission has 90 days to take action on an Application For Review of a USAC decision.

their competitors do not and would better fulfill the objective of the statute that service providers contribute on an equitable and nondiscriminatory basis.

B. Determining Contribution Obligations Through A Broader Definitional Approach

As an alternative to enumerating specific telecommunications services assessable for universal service purposes, the Commission asks whether it should adopt a general rule identifying which providers of interstate telecommunications are required to contribute. While a general rule may have some theoretical surface appeal, the language proposed by the Commission is far too narrow. A better approach would be for the Commission to adopt a broad rule together with a non-exclusive list of the services covered by the rule.

The Commission's proposed rule states as follows:

Any interstate information service or interstate telecommunications is assessable if the provider also provides the transmission (wired or wireless), directly or indirectly through an affiliate, to end users.⁵¹

The Commission's proposal would require only facilities-based providers to contribute to the universal service fund. As the Commission has explained, the rule "is intended to include entities that provide transmission capability to their users, whether through their own facilities or through incorporation of services purchased from others, but not to include entities that require their users to 'bring their own' transmission capability in order to use a service." The Commission should not adopt the proposed rule because it would exempt too many services that should contribute. For example, the proposed rule would exempt over the top VoIP providers that contribute to the universal service fund today, as well as one-way VoIP providers that the

⁵² FNPRM at ¶76.

⁵¹ FNPRM at ¶75.

Commission proposes to assess, from contributing to the extent that they require their end users to provide their own broadband connections.⁵³ Because these VoIP providers offer voice services that compete directly with the voice services offered by common carriers, excluding them from the contribution base would be inconsistent with prior Commission rulings extending contribution requirements to providers of telecommunications that compete directly with common carriers.⁵⁴ Limiting the contribution base to facilities-based carriers would also be contrary to the National Broadband Plan's recommendation that the Commission expand the contribution base.⁵⁵ Nor would the proposed rule improve efficiency, fairness or the sustainability of the universal service fund because it would limit the contribution base by shifting the burden of funding universal service to facilities-based providers and possibly even create a disincentive for providers to invest in their own facilities.

COMPTEL is aware of no policy or administrative reasons that the Commission should decline to exercise its permissive authority to require contribution from entities that incorporate telecommunications purchased from other entities into their own service offerings while exercising that same permissive authority to require contribution from entities that provide service wholly over their own facilities.⁵⁶ The Commission candidly admits that its contribution methodology has never exempted non-facilities-based telecommunications providers from their obligation to contribute and that the Act itself does not distinguish between facilities-based and non-facilities-based telecommunications providers for purposes of the obligation to contribute to

⁵³ FNPRM at ¶80.

See FNPRM at ¶76.

National Broadband Plan Recommendation 8.10 (noting that today the contribution base includes interconnected VoIP and recommending that the base be expanded).

⁵⁶ FNPRM at ¶83.

the universal service fund.⁵⁷ Nor does the Commission provide any explanation as why it believes it is appropriate to do so now. Excluding providers that provide service with a combination of their own facilities and facilities purchased from others will shrink rather than expand the contribution base and is likely to significantly increase rather than reduce the assessment factor to which such carriers will be subject.

Rather than limit the contribution base to facilities-based carriers, the Commission should tweak the language of existing rule 54.706(a) to read as follows:

a) Entities that provide interstate telecommunications or information services to the public, or to such classes of users as to be effectively available to the public, for a fee must contribute to the universal service support mechanisms. Certain other providers of interstate telecommunications, such as payphone providers that are aggregators, providers of interstate telecommunications for a fee on a non-common carrier basis, and interconnected VoIP providers, also must contribute to the universal service support mechanisms. Interstate telecommunications include, but are not limited to: [list assessable services]

Retaining a non-exclusive list of specific services that are assessable would provide helpful guidance to potential contributors regarding their contribution obligations and would minimize opportunities for arbitrage so long as the list is updated on a regular basis -- no less than once a year -- as new services are introduced and made available to the public.

The Commission should not exclude free or advertising-supported services or machine-to-machine connections from the contribution base. Free services, advertising-supported services and machine-to-machine connections convey information between locations using wired or wireless transmission -- *i.e.*, via telecommunications -- and should not be exempt from contribution. The fact that a business chooses not to charge end users for a service should be

20

⁵⁷ FNPRM at ¶83.

irrelevant to its contribution obligations. Free services such as Google Voice and Skype⁵⁸ compete directly with traditional voice services that are required to contribute to the universal service fund and should not be exempt from contribution. The Commission asks whether machine-to-machine connections should be treated the same as connections between or among people.⁵⁹ COMPTEL submits that they should be. The statute does not specify that the "user" referenced in Section 153 (43) of the Act must be human.

III. HOW CONTRIBUTIONS SHOULD BE ASSESSED

The Commission asks whether it should retain, but reform, the revenue-based contribution system or switch to a numbers-based or connections-based contribution system or adopt a hybrid approach. COMPTEL agrees that the current revenue-based system needs reform but submits that retaining it in substantially modified form would be preferable to a connections-based or numbers-based contribution system at this time. The lack of specificity in the Commission's connections-based approach makes meaningful comment impossible. Unless and until the Commission provides more detail with respect to how it proposes to define and assess connections, there is no way to realistically evaluate the impact of a connections-based contribution system on contributors and end users. While a numbers-based system might be relatively easy to administer, services that do not use or are not assigned North American Numbering Plan numbers would be exempt from contribution, and these exemptions would limit,

See e.g., Skype S.a.r.l. Prospectus, Amendment No. 2 to Form S-1 Registration Statement at 14, 30-31 (Mar. 4, 2011) (SkypeOut product enables users to make low-priced calls to landline and mobile devices; "we compete with certain products and services offered by regulated telecommunications companies that provide landline, cable or wireless communications products and hardware-based VoIP telecommunications providers"; "we compete increasingly with small and medium sized enterprise telecommunications service providers").

⁵⁹ FNPRM at ¶87.

⁶⁰ FNPRM at ¶96.

rather than expand, the contribution base. Moreover, to the extent that all telephone numbers are assessed a flat fee, light users would subsidize heavy users in a manner that is neither equitable nor nondiscriminatory.

A. Reforming the Revenues-Based System

As the Commission has acknowledged, the current revenues-based contribution system has failed to keep pace with changes in technology and the way telecommunications services are marketed and used today. The lack of clear direction with respect to the assessability of many services has led different carriers to interpret their contribution obligations differently, resulting in competitive inequities in the funding of universal service. The Commission should use this opportunity to adopt more bright line rules and eliminate the ambiguities that exist in the present contribution system.

1. Apportioning Revenues From Bundled Services

The Commission currently gives providers three choices for apportioning revenues from bundled services where some of the services are assessable and some are not. The provider may (1) elect to report telecommunications service revenues based on the unbundled service price with no discount allocated to the telecommunications service; (2) elect to treat all bundled revenues as telecommunications revenues; or (3) use any other allocation method. Unlike the first two allocation methodologies, the third does not enjoy safe harbor status and if challenged, providers are required to demonstrate the reasonableness of the method used. ⁶¹ In order to promote more consistency in reporting, the Commission proposes to adopt the following rule:

If an entity bundles non-assessable services or products (such as customer-premises equipment) with one or more assessable services, it must either treat all revenues for that

22

In the Mattter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-91, Report and Order, 16 FCC Rcd 7418 at ¶50-53 (2001).

bundled offering as assessable telecommunications revenues or allocate revenues associated with the bundle consistent with the price it charges for stand-alone offerings of equivalent services or products (with any discounts from bundling assumed to be discounts in non-assessable revenues).⁶²

In other words, the Commission's proposes to codify the two safe harbor allocation methodologies and eliminate the third option. Eliminating the third option, which affords providers considerable latitude in determining assessable revenues, will promote stability in the universal service fund and curtail opportunities for providers to minimize their contribution obligations through their allocation methods.

Surprisingly, the Commission asks how the rule would be enforced if the provider does not offer stand alone equivalent services.⁶³ The proposed rule specifically addresses the situation where a provider of bundled services does not offer the telecommunications service on a stand alone basis. If a provider does not offer stand alone equivalent services that are separately priced, it would have to treat all revenues for the bundle as assessable.

The Commission should not adopt a separate rule allowing providers to make individualized showings as they are permitted to do under current policy. The Commission admits that in the 11 years since that policy has been in effect, it has *never once* addressed the reasonableness of any alternative methodology employed by a provider to apportion revenues in a bundled offering.⁶⁴ Assuming that what is past is prologue, continuing the practice of allowing providers unlimited discretion in deciding what portion of bundled packages are

⁶³ FNPRM at ¶¶107-110.

⁶² FNPRM at ¶106.

NPRM at ¶103.

assessable with no Commission oversight will only perpetuate the competitive inequities in the current contribution process.

2. Contributions For Services With An Interstate Telecommunications Component

The Commission requests comment on the following rule designed to address information services that provide interstate telecommunications:

If an entity offers an assessable information service with an interstate telecommunications component, it must treat all revenues for that information service as assessable revenues, unless it offers the transmission underlying the information service separately on a stand-alone basis. If it offers the transmission on a stand-alone basis, it may treat as assessable revenues an amount consistent with the price it charges for stand-alone offerings of equivalent transmission. ⁶⁵

COMPTEL submits that a rule such as this would simplify the process for determining assessable revenues for information services, including those that are implemented with MPLS protocols, and would do so in a way that is transparent, enforceable and easily administrable. The Commission should not craft a rule that allows carriers that do not offer the transmission service on a stand-alone basis to use the general retail price of transmission services offered on a stand-alone basis by other carriers. Such a rule would create additional opportunities for providers to attempt to minimize their contributions – this time by using the lowest price for a retail transmission service that they can find, regardless of whether the service is offered in their service territory or is comparable to the transmission service provided to their end users. If a provider does not offer the underlying transmission component on a stand-alone basis, it should be required to contribute on the retail revenues for the integrated information service.

⁶⁶ NPRM at ¶118.

24

NPRM at ¶117.

The Commission's alternative proposal – to assess a certain (but unspecified) percentage of the retail revenues of information services with a telecommunications component⁶⁷ – would be arbitrary and would unnecessarily complicate the calculation process. To the extent that the Commission is looking for solutions that would be easy to administer and reduce compliance costs, it should not even think about assigning different contribution factors to different services.

3. Allocating Revenues Between Inter- and Intrastate Jurisdictions

In light of changes in the marketplace and the continued deployment of IP-based networks, the Commission proposes to modify or eliminate the requirement that carriers are assessed based on interstate and international revenues and asks whether the Act compels it "to only assess a portion of revenues associated with services that operate interstate, intrastate and internationally." Although the Act may permit the Commission to assess universal service contributions on providers of interstate and international telecommunications, it does not clearly authorize the Commission to assess intrastate revenues or services. Section 254(d) of the Act mandates only that telecommunication carriers that provide *interstate* telecommunications services contribute to the universal service fund. That Section also gives the Commission discretion to require providers of *interstate* telecommunications to contribute. Section 254 does not directly address the obligation of carriers that offer intrastate services to contribute to the federal universal service fund. Section 152 provides that the Act "shall apply to all *interstate and foreign* communication by wire or radio and all *interstate and foreign* transmission of energy

⁶⁷ FNPRM at ¶119.

⁶⁸ FNPRM at ¶¶127-128.

In contrast, Section 254(f) provides that telecommunications carriers that provide *intrastate* service shall contribute in an equitable and nondiscriminatory manner, determined by the *State*, to the preservation and advancement of universal service in the *State*.

by wire or radio"⁷⁰ and that except as provided in Sections 223 through 227 and Section 332, "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier. . . ."⁷¹ The Supreme Court has held that "[i]nsofar as Congress has remained silent . . . §152(b) continues to function." ⁷² Thus, with the possible exception of revenues from services where intrastate cannot be separated from interstate and international, it is doubtful that the Commission has jurisdiction to assess intrastate revenues.⁷³

The Commission acknowledges that in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), the Court found that the Commission did not have jurisdiction to assess federal universal service contributions on intrastate revenues,⁷⁴ but asks whether that decision would prohibit it from assessing a federal universal service contribution on all revenues derived from services delivered over a public network.⁷⁵ A contribution system that assesses all telecommunications revenues without regard to the jurisdiction of the services would certainly be

⁷⁰ 47 U.S.C. §152(a) (emphasis added).

⁴⁷ U.S.C. §152(b) (emphasis added). *See also, Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 377, n.5 (1986) ("[Section] 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction.")

⁷² *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 381 (1999).

Id. (Commission must show that a statutory provision applies to intrastate services in an unambiguous and straightforward manner "in order to override the command of" Section 152(b)).

⁷⁴ FNPRM at ¶129-130.

⁷⁵ FNPRM at ¶130.

simpler to administer than the current system and would better ensure that all carriers are contributing equitably. It would appear that the only way the Commission could justify such a system, however, would be to interpret the statutory contribution language of Section 254(d) as meaning that *all* services of all providers of any interstate telecommunications or telecommunications services are subject to contribution, regardless of whether the services are intrastate, interstate or international.

As an alternative to assessing all revenues from all services, the Commission asks for comment on adopting bright line rules for how companies should allocate revenues between jurisdictions for broad categories of services – for example 20 percent of all voice revenues would be allocated to the interstate jurisdiction and 80 percent to the intrastate jurisdiction. COMPTEL submits that if the Commission were to adopt such bright-line rules, it should not adopt separate allocators for fixed local services, mobile services, toll services, and VoIP services. All voice services should be subject to the same intrastate/interstate allocators regardless of the technology used to provide the service and all data services should be subject to the same intrastate/interstate allocators regardless of whether the data is provided using circuit-switched or packet-switched technology. Avoiding the use of different allocators for voice services provided using different technologies would be far more competitively neutral than adopting separate allocators for different transmission technologies. All Internet access services, which the Commission has previously determined to be interstate, should be allocated 100 percent to the interstate jurisdiction.

⁷⁶ FNPRM at ¶132.

See e.g., In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, 17 FCC Rcd 4798 (2002), aff'd. sub nom. National Cable Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) (Internet access service is an interstate service).

If the Commission adopts bright-line rules, carriers should no longer be permitted to submit particularized traffic studies in an effort to show that a higher percentage of their traffic is intrastate. Doing so would defeat the purpose of adopting bright line rules, which would be to minimize competitive distortions among providers offering similar services and stabilize the contribution base. Any bright line percentages, however, should be updated at least annually. If the Commission does continue the practice of allowing carriers to make individualized showings of their intrastate/interstate/international ratios, it must codify specific requirements with respect to how traffic should be categorized in an effort to standardize the process and avoid wide variations in the reported ratios. Wide variations in the ratios cannot help but indicate that carriers are classifying their traffic in significantly different ways and such variations lead to inequitable contributions among carriers.

4. Contribution Obligations of Wholesalers and Their Customers

Under the Commission's current rules, wholesale carriers generally do not contribute to the universal service fund on carrier's carrier revenues. To avoid the contribution obligation, the wholesale carrier must have procedures in place to ensure that it only reports revenues from resellers that reasonably would be expected to contribute to the fund as carrier's carrier revenues. Such procedures include obtaining a certificate from the reseller that it contributes to the universal service fund and verifying on the Commission's website that the reseller is a contributor. As the Commission recognizes, confusion has arisen in situations where the

⁷⁹ FNPRM at ¶137.

⁷⁸ FNPRM at ¶136.

wholesale customer incorporates the purchased telecommunications product into a nonassessable product, such as broadband Internet access, that is then made available to retail customers.⁸⁰

a. The Commission Should Not Adopt A Value Added Payment System

The Commission asks whether it should change its procedures to ensure that the universal service fund does not lose revenues in situations where the wholesale customer provides both assessable and non-assessable services to its retail customers and thus may contribute on some services provided using wholesale components but not others. One approach the Commission suggests to address this issue is a "value added" payment system in which each carrier in the supply chain pays universal service fees on the value it adds to the services provided, with subsequent carriers receiving credit for services purchased from other contributors. In other words, the wholesale carrier would be assessed on wholesale revenues and a reseller on the retail markup. COMPTEL submits that such a system would unduly complicate the assessment and contribution processes and would not be necessary if the Commission expands the contribution base to encompass services that are currently non-assessable, including broadband Internet access service. Under a system that assesses all services that use the public network – voice and data -- the Commission could continue to assess universal service fees based on end user

⁸⁰ FNPRM at ¶147.

⁸¹ FNPRM at ¶148.

FNPRM at ¶¶149-161. As an alternative, the Commission proposes a value added methodology in which carriers subtract from their final contribution liability any pass through charges paid to other contributors. FNPRM at ¶154. Although the end result of both methodologies should be the same, the alternative would require carriers to include an explicit universal service line item charge for their telecommunications provider customers.

See, e.g., FNPRM at $\P155$ where the Commission discusses the need to limit credits to account for revenues not subject to assessment.

revenues without risk of losing contributions on non-assessable services provided by wholesale customers to their end users.

The Commission should strive to keep the assessment methodology as simple as possible. Ambiguities are more likely to arise as complexities are introduced as will surely be the case to the extent that the Commission implements a value added methodology with debits/credits and scaling. Any advantage in a value added methodology for catching revenues on services that are not assessed today would disappear to the extent the Commission expands the contribution base to include broadband Internet access and other data services that currently escape contribution by virtue of their information service classification.

b. Contributor Certificates

Wholesalers are currently able to verify whether their customers contribute to universal service by checking the Commission's website. That information together with a certificate stating that the purchaser incorporates the wholesale service into its own service offerings should be sufficient to ensure that revenues from the purchases are properly recorded as carrier's carrier revenues and that the purchaser will contribute on its end user revenues. Again, if the Commission expands the contribution base to include all services that use the public network, as it should, and all such services are properly assessable, the risk of losing universal service contributions on services that are not assessable today will be eliminated.

http://fjallfoss.fcc.gov/cgb/form499/499a.cfm.

FNPRM at ¶¶152-155.

5. International Telecommunications Providers

COMPTEL supports the Commission's proposal to eliminate the limited exemption for providers whose revenues are exclusively or predominantly international. ⁸⁶ To the extent such providers use the domestic public telecommunications network to originate or terminate calls, they should not be exempt from contribution to the universal service fund. While no contributor's universal service obligation should exceed its interstate and international revenues, no contributor should be permitted to exclude its international revenues from its contribution base where such revenues are earned from services that originate or terminate on the domestic network. All those who benefit from access to the network, including those who provide international service, should contribute to its support. Eliminating the LIRE exemption will make the contribution system more equitable and nondiscriminatory by ensuring that those providers that qualify for the exemption do not have an unfair advantage over their competitors that do not qualify.

6. Reforming the *De Minimis* Exemption

Under the *de minimis* exemption, providers are excused from contributing to the universal service fund if their annual contribution would be less than \$10,000.⁸⁷ The Commission asks for comment on whether it should modify the exemption to excuse providers from contributing if their total assessable revenues are less than \$50,000 in any given year.⁸⁸ COMPTEL supports the modification. Basing the exemption on revenues rather than potential

⁸⁷ FNPRM at ¶210.

⁸⁸ FNPRM at ¶213.

31

⁸⁶ FNPRM at ¶200.

contributions would introduce more certainty for providers whose qualification for the exemption would no longer be subject to quarterly variations in the assessment factor.

B. Assessing Contributions Based on Connections

The Commission asks for comment on switching from a revenue-based to a connections-based contribution methodology and whether a connections-based methodology would better promote its proposed goals of promoting efficiency, fairness and sustainability. Under such a methodology, providers would be assessed a fixed amount per connection times the number of connections to a communications network provided to customers. The Commission provides no specifics on what the contribution factor might be for each connection but states that there might be one factor for individuals and higher factors for higher speed or capacity connections provided to enterprise customers. With no information on the magnitude of the charge to be assessed per connection or the mechanics of how a tiered system might be implemented for higher speed and capacity connections, it is impossible to evaluate whether a connections based approach would be equitable and nondiscriminatory as required by Section 254. The last time the Commission requested comment on a connections-based contribution approach, It is proposed a universal service charge of \$5.00 per month for connections up to 64 kbps and \$35.00 per month for connections over 64 kbps.

⁸⁹ FNPRM at ¶220.

⁹⁰ *Id.*

In the Matter of High Cost Universal Service Support, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008).

Id. at Appendix B, ¶81; see also, FNPRM at n. 401.

methodology would have disproportionately impacted small businesses vis a vis enterprise customers and would have put a significant financial strain on customers with fewer lines.⁹³

The merits or demerits of a connection-based contribution proposal cannot be judged in the abstract. The Commission asks for comment on whether connections should be defined as physical facilities or services. ⁹⁴ If connections were defined as services, the Commission proposes that a customer might be assessed one unit charge for voice service, one for Internet access, one for text messaging and one for each and every other service delivered over the same facility. ⁹⁵ Depending upon how the contribution system was structured, a residential customer receiving voice service over a copper line and Internet access service via DSL over the same copper line could conceivably be charged for the same number of units as an enterprise customer receiving voice and Internet access over a DS3.

The current FNPRM lacks the detail necessary to meaningfully analyze whether and/or how a connections-based proposal would affect what contributors and end users pay to fund universal service. The lack of specificity may be appropriate for a Notice of Inquiry, but it is not appropriate for a Notice of Proposed Rulemaking. For example, the Commission has not yet decided whether a connections-based methodology should be based on tiered speed levels or tiered capacity levels or both, whether speed tiers should be based on advertised speed or actual speed, whether tiers should be based on usage rather than speed, whether and how burstable bandwidth should be assessed, whether telecommunications should be distinguished from non-telecommunications, whether to differentiate between interstate and intrastate connections, or

See Comments of COMPTEL filed November 26, 2008 in WC Docket No. 05-337, *et al.*, at 24-28.

⁹⁴ FNPRM at ¶¶232, 237.

⁹⁵ FNPRM at ¶236.

whether to distinguish between residential/mass market and business/enterprise connections. ⁹⁶ The manner in which the Commission resolves each of these issues will significantly affect the assessment factor and the pass through charges that end users are forced to bear. COMPTEL urges the Commission to resolve these issues and seek comment on specific contribution levels for specific facilities and/or service connections before even considering replacing the revenues-based contribution methodology with a connections-based methodology.

C. Assessing Contributions Based On Numbers

As an alternative to both revenues and connections, the Commission seeks comment on a numbers-based assessment methodology.⁹⁷ While there may be advantages to a numbers-based assessment methodology from an ease of administration standpoint, the overall disadvantages of such a methodology outweigh those advantages. First, a numbers-based system would not necessarily expand the base of contributors and would not assess voice services that compete with traditional telephone services, but that do not use North American Numbering Plan telephone numbers, such as Skype and prepaid calling card services. A numbers-based plan also would not assess high capacity services that contribute today but that are not assigned telephone numbers, such as certain special access and private line services. Second, because a numbers-based system would assess a flat fee on all telephone numbers, ⁹⁸ telephone subscribers that are light users would subsidize subscribers that are heavy users and are likely to see their monthly USF assessment increase even though their network usage does not increase. It is questionable whether such a result would be consistent with the statutory requirement that all providers

⁹⁶ FNPRM at ¶¶249-268.

⁹⁷ FNPRM at ¶¶284-321.

⁹⁸ FNPRM at ¶¶285-286.

contribute to the fund on an equitable and non-discriminatory basis. Third, to the extent that data and/or information services are not assigned NANP telephone numbers, a numbers-based approach would perpetuate the state of affairs that exists today with voice customers financing a universal service fund that is paying for nationwide landline and mobile broadband networks and Internet access services. Again, it is questionable whether such a system would meet the statutory requirement that providers contribute to the fund on an equitable and non-discriminatory basis.

IV. IMPROVING THE ADMINISTRATION OF THE CONTRIBUTION SYSTEM

A. Revising the Frequency of Adjustments to the Contribution Factor

The Commission asks whether it should revise the frequency with which it adjusts the contribution factor from quarterly to annually or semiannually in order to reduce fluctuations. ⁹⁹ It is not the frequency with which the Commission changes the contribution factor, but the ever increasing nature of the contribution factor that should be revised. The contribution factor has risen steadily from 6.6 percent in the first quarter of 2001¹⁰⁰ to 17.9 percent in the first quarter of 2012. ¹⁰¹ Unfortunately, because there is no ceiling on the amount the Commission can force telecommunications providers to pay to fund universal service, there is no ceiling on the assessment factor. Expanding the contribution base and reducing the assessment factor would definitely serve the public interest. Continuing to raise the assessment factor every quarter, twice a year or even once a year, however, will perpetuate the pattern the Commission has followed for the last decade and intensify the burden that consumers and businesses must bear.

⁹⁹ FNPRM at ¶¶353-356.

FCC Public Notice, Proposed First Quarter 2001 Universal Service Contribution Factor, CC Docket No. 96-45, DA 00-2764 (rel. Dec. 8, 2000) (6.6%).

FCC Public Notice, Proposed First Quarter 2012 Universal Service Contribution Factor, CC Docket No. 96-45, DA 11-2020 (rel. Dec. 14, 2011) (17.9%).

Establishing a cap on the contribution factor would provide far more certainty than reducing the frequency of adjustments to the factor.

B. Pay-and-Dispute Policy

The Commission asks for comment on whether it should adopt either as policy or as a rule USAC's pay-and-dispute practice. Pursuant to this practice, telecommunications providers are required to pay the amounts USAC invoices them and then seek review from either USAC or the Commission or face substantial late fees, interest charges and penalties on any unpaid amounts.

COMPTEL submits that the Commission should not adopt USAC's pay-and-dispute practice as a policy or rule. If it does, any such policy or rule should be expressly conditioned on the Commission's compliance with the requirement in Section 54.724 of the existing rules that it issue a written decision in response to a request for review of a USAC decision within 90 days. Far too often, both the Bureau and the Commission itself fail to comply with the 90 day time deadline for resolving requests for review of USAC decisions and requests for review

¹⁰² FNPRM at ¶360.

See 47 C.F.R. § 54.724 of the Commission's rules.

See e.g., In the Matter of Universal Service Contribution Methodology, Emergency Request for Review of Universal Service Administrator's Decision by Level 3, WC Docket No. 06-122, Order (rel. January 29, 2010) (request for review filed August 15, 2008, Order released January 20, 2010); In the Matter of Universal Service Contribution Methodology, Application for Review of a Decision by the Wireline Competition Bureau by inContact, Inc., WC Docket No. 06-122, (petition for review of USAC decision filed April 13, 2009, Wireline Competition Bureau Order released May 17, 2010, 25 FCC Rcd 4739, Commission Memorandum Opinion and Order, FCC 12-4 released January 5, 2012); In the Matter of Universal Service Contribution Methodology, Request For Review of a Decision of the Universal Service Administrator by Clear World Communications Corp., WC Docket No. 06-122 Memorandum Opinion and Order, FCC 11-187 (request for review of USAC decision filed October 15, 2009, Wireline Competition Bureau Order released April 29, 2011, 26 FCC Rcd 2634, Commission Memorandum Opinion and Order released December 23, 2011).

remain unresolved for years. USAC does not pay telecommunications providers interest on disputed amounts when the providers prevail on their appeals. Short of requiring USAC to pay interest on the disputed amounts paid to USAC when providers prevail on appeal, the least the Commission can do is decide those appeals on a timely basis as required by Section 54.724 of the rules.

V. RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS FROM END USERS

A. Pass-Through of USF Contributions As a Separate Line Item

Under the Commission's current rules, telecommunications providers are specifically permitted to recover their universal service contribution costs from their end users. ¹⁰⁵ If they do so through a specific federal universal service line item charge, that charge cannot exceed the interstate telecommunications portion of the end user's bill times the relevant contribution factor. The Commission asks for comment on whether it should provide greater transparency regarding the recovery of universal service fees "to enable consumers to make informed choices regarding their service." ¹⁰⁶ For example, the Commission asks whether it should require providers to identify the portion of a customer's bill that is subject to assessment. ¹⁰⁷ To the extent the Commission believes that a separate federal universal service line item charge does not provide enough transparency, it should require carriers to do no more than specify the contribution factor if a revenues-based contribution system is retained or the number of connections or numbers subject to assessment and the contribution factor if a connections- or numbers-based contribution system is adopted.

37

¹⁰⁵ See 47 C.F.R. §54.712.

¹⁰⁶ FNPRM at ¶390.

¹⁰⁷ *Id.*

Telecommunications customers have a right to know what they are paying for universal service and the separate federal universal service line item serves that purpose. The Commission asks whether it should require providers to include the universal service contribution in the advertised price of a service. 108 Including the universal service contribution in the advertised price of a service would make the contribution burden consumers must bear far less transparent and would require service providers to change the advertised prices of their services every time the contribution factor changes. As the Commission is well aware, the federal universal service charge is just one of many charges or surcharges imposed or authorized by various governmental entities that are separately identified on today's telephone bills in addition to the basic price of a service. Aside from the federal universal service charge, these charges may include (depending on the jurisdiction), but are not limited to, 911 fees, public rights of way use fees, state universal service charges, gross receipts charges, federal excise taxes, federal subscriber line charges, "local telecom and cable tax surcharges," "regulatory charges" or "regulatory cost recovery charges," "administrative charges," and state cellular surcharges. In the not too distant future, incumbent local exchange carriers will also be able to impose a monthly fixed charge known as the ARC on end user bills to mitigate losses in intercarrier compensation. ¹⁰⁹ Breaking these charges and surcharges out on a line-by-line basis provides far more transparency and information to the end user than hiding one or more of them in the advertised price of the service would. Moreover, the Commission and USAC reset the universal service contribution factor every quarter under the current rules and these adjustments would require providers to change the advertised prices of their services as many as four times a year just to reflect changes in the

¹⁰⁸ FNPRM at ¶ 391.

Connect America Fund Order at ¶852.

universal service assessment factor as opposed to reflecting any increases or reductions in the universal service line item charge.

The Commission also asks whether it should mandate that carriers disclose to customers (especially mass market customers who have little "leverage") at the time of initial subscription the amount of the quoted rate or other assessable units that would be subject to universal service assessment in a way that promotes price comparison and evaluation. COMPTEL is not sure where the Commission is going with this inquiry or why it thinks a customer's "leverage" has anything to do with the amount the Commission requires providers to contribute to the universal service fund. Universal service contributions are a cost of doing business for telecommunications providers and providers must recover them either in the prices for the services charged to end users or in separate line item charges. Requiring carriers to disclose the amount of the quoted rate or other assessable units subject to universal service assessment is less likely to promote price comparison and evaluation than to provide incentives for carriers to minimize the assessable revenues they report to USAC and the Commission.

Under no circumstances should the Commission limit carrier flexibility to recover their universal service contributions from end users through line items or surcharges. He noted above, identifying the federal universal service charge as a separate line item on a customer's bill provides the most transparency and information to the customer in terms of what he or she is paying each month to defer the multi-billion dollar annual cost of the universal service fund. Having this information readily available is far more advantageous to the customer than having it buried in the quoted price of the service subject to universal service obligations. If the

¹¹⁰ FNPRM at ¶¶392-393.

¹¹¹ FNPRM at ¶394.

Commission truly wants to promote transparency, it should not restrict the rights of carrier to inform their customers in the simplest and plainest way possible what they are paying for universal service.

B. Segregation of USF Pass-Through Charges

The Commission states that when a telecommunications provider files for bankruptcy, funds collected from end users to recover universal service costs are often claimed as part of the bankruptcy estate and USAC must participate in the bankruptcy proceedings in order to recover the funds. To address this situation, the Commission asks whether it should adopt a rule specifying that telecommunications providers that recover their contribution obligations from end users are acting on behalf of the universal service fund and requiring them to segregate those payments in dedicated accounts for the sole benefit of the fund. The Commission also proposes requiring providers to give USAC direct access to and signature authority on the dedicated accounts. The Commission should not adopt such a rule.

The bankruptcy statute defines the estate as all legal or equitable interests of the debtor in property at the commencement of the case. 11 U.S.C. §541(a). This would include the funds in all operating accounts used to pay USAC and other obligations of a telecommunications debtor. What the Commission is proposing is a device that it apparently hopes would allow USAC to obtain priority over other creditors to be paid in full by shielding certain assets of the debtor from other creditors. Even if the Commission were to adopt such a rule, it is not at all clear that a

¹¹³ FNPRM at ¶¶398-400.

¹¹² FNPRM at ¶398.

bankruptcy court would not view any payments made to USAC within 90 days of the filing of a bankruptcy petition as avoidable preferences.¹¹⁴

In any event, the Commission cites to no authority that would give it jurisdiction to force telecommunications providers not only to establish dedicated trust accounts for universal service contributions, 115 but also to give USAC direct access to and signatory authority over those accounts. Nor does the Commission indicate what would happen if such a rule was adopted and the boards of directors or auditors of contributing companies decided that it was not fiscally responsible or in the best interest of the companies to give an outside entity access to or signatory authority over an operating account. Would the Commission bring enforcement actions against the companies that followed the directives of their boards or auditors by declining to give USAC direct access to or signatory authority over their operating accounts? In the absence of any statutory authority giving the Commission jurisdiction to adopt or enforce rules that would prioritize USAC's claims over the claims of other creditors in bankruptcy proceedings or that would require telecommunications providers to give USAC access to and signatory authority over operating accounts, the Commission should refrain from overstepping its bounds.

C. Limiting Pass-Through of USF Charges to Lifeline Subscribers

The Commission's rules currently prohibit incumbent LECs from recovering their universal service contribution costs from Lifeline services provided to Lifeline customers. 116

¹¹⁴ See 11 U.S.C. §547.

Compare 26 U.S.C. §7501, which provides that whenever a person is required to collect or withhold any internal revenue tax from another person and to pay over such tax to the United States, the amount of the tax collected or withheld shall be held to be a special fund in trust for the United States.

¹¹⁶ 47 C.F.R. §54.712.

The Commission asks whether it should extend the current rule to also prohibit competitive ETCs from recovering USF charges for Lifeline offerings. COMPTEL submits that it should so extend the rule. COMPTEL also submits, however, that the Commission should exempt Lifeline payments made by USAC to ETCs from contribution.

Fifteen years ago, the Commission determined that non-profit schools, colleges, universities, libraries, and health care providers should not be subject to universal service contribution requirements to the extent they provide interstate telecommunications on a non-common carrier basis. Acknowledging that many such entities will be eligible to receive support through the Schools and Libraries and Rural Health Care universal service programs, the Commission determined that "it would be counter-productive to the goals of universal service" to require these entities to contribute to universal service support "because such action effectively would reduce the amount of universal service support they receive." The same is true with respect to the Lifeline program. ETCs that provide Lifeline service receive Lifeline support payments from USAC on behalf of their low income customers. To subject these Lifeline payments to universal service assessment is also counter-productive and effectively reduces the amount of universal service support ETCs receive on behalf of their low income customers for providing Lifeline service.

¹¹⁷ NPRM at ¶404.

In the Matter of Federal-State Joint Board on Universal Service, WC Docket No. 96-45, 13 FCC Rcd 5318 at \$9284 (1997).

¹¹⁹ *Id.*

CONCLUSION

COMPTEL respectfully requests that the Commission reform and modernize the universal service contribution system consistent with the foregoing.

Respectfully submitted,

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